No. 492

In the Supreme Court of the United States

OCTOBER TERM, 1957

A. LINCOLN GREEN, PETITIONER

v.

STANLEY BAUGHMAN, PRESIDENT, FEDERAL NATIONAL MORTGAGE ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The district court wrote no opinion with respect to its final order granting summary judgment in favor of respondents. Its earlier opinions granting summary judgment in favor of petitioner (R. 9) and dismissing petitioner's original complaint are not officially reported.

The opinion of the court of appeals affirming the district court's award of summary judgment to respondent (Pet. 4a-9a) is reported at 243 F. 2d 610. The

opinion of the court of appeals sustaining the sufficiency of the charges against petitioner (Pet. 1a-3a) is reported at 229 F. 2d 33, and its opinion affirming the dismissal of petitioner's original complaint for failure to exhaust his administrative remedy is reported at 214 F. 2d 878.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's award of summary judgment to respondents was entered January 31, 1957. Petitioner's timely petition for a rehearing *en banc* was denied by the court of appeals on March 25, 1957. The petition for a writ of certiorari was filed June 13, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether petitioner's removal from his federal employment was accomplished with full observance of his rights under Section 14 of the Veterans' Preference Act.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations involved are set out in Appendix A, *infra*, pp. 12-13.

STATEMENT

Prior to September 19, 1952, petitioner was employed as an attorney, Grade GS-13, with the Federal National Mortgage Association (FNMA), a corporate agency of the United States (R. 9). On July 14, 1952, he was served with a statement of charges (R. 39) which constituted notice of his proposed discharge in accordance with Section 14 of the Veterans' Preference Act, 5 U.S.C. 863. These charges, signed by respondent

Baughman, President of FNMA, accused petitioner of improper conduct toward office personnel (Charge I), improper use of Government office and property (Charge II), improper use of Government personnel (Charge III), improper absences from office (Charge IV), and refusal to respect authority of superiors (Charge V) (R. 39-44).[1] Each charge specified the period during which this alleged misconduct took place and each listed a substantial number of examples.

By letter of July 23, 1952, petitioner requested from Baughman a more specific statement of charges, and demanded that Baughman disqualify himself from judging the matter (R. 45-62). Baughman replied that the charges were sufficiently specific, and refused to disqualify himself (R. 62-63).

Thereupon petitioner on September 9, 1952, filed a fifty-nine page affidavit of reply with attached exhibits, in which he attempted to answer the charges against him, denying, or admitting and explaining, them (R. 63-141). His answer was given careful consideration (R. 142), but on September 19, 1952, he was notified that "the charges are sustained" and his employment with FNMA terminated as of that date (R. 142-143).

On September 29, 1952, petitioner filed timely notice of appeal with the Chief Law Officer of the Civil Service Commission, alleging defects in the charges, and asserting that the charges were not serious enough to warrant dismissal (R. 144-152). Before this appeal was heard by the Commission, however, petitioner sued for reinstatement in the United States District Court for the District of Columbia, alleging, *inter alia*, that

[1] For the convenience of the Court, the charges are set out verbatim in Appendix B, *infra*, pp. 14-19.

the statement of charges against him was not sufficiently specific to meet statutory requirements, and that Baughman, the administrative officer who made the decision dismissing petitioner, was biased and prejudiced against him. The district court, Holtzoff, J., on May 4, 1953, granted the Government's motion to dismiss on the ground that petitioner had failed to state a cause of action. The court held that at least Charge Ia was sufficiently specific and that one good charge is enough to justify severance from the service. It held further that the allegation of bias and prejudice was insufficient as a matter of law. Upon appeal the Court of Appeals for the District of Columbia Circuit affirmed the decision below, but on the ground that petitioner had failed to exhaust his administrative remedy. *Green v. Baughman*, 214 F. 2d 878.

In the meantime, after an independent investigation of the evidence in support of the charges had been conducted by Civil Service personnel, a hearing on petitioner's administrative appeal had been held by the Civil Service Commission on March 4, 1953 (R. 28), and on June 5, 1953, the Chief Law Officer of the Commission filed his decision affirming the dismissal (R. 161-184). This decision discussed in detail the charges against petitioner and the evidence submitted in connection with them, and concluded (R. 183): "Under all of the facts and circumstances of the case, it is found that the discharge of Mr. Green was for such cause as will promote the efficiency of the service, and that the personnel action of the Federal National Mortgage Association was not arbitrary, unreasonable or capricious." Petitioner immediately appealed to the Commission's Board of Appeals and Review (R. 186),

which on February 3, 1954, sustained his discharge (R. 195-196). The Board held that Charges Ia, Ib, II, and III "are procedurally valid and that the removal action was justified and was for such cause as will promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act of 1944, as amended, on the basis of these charges." The Board found, however, that Charges IV and V "are defective due to lack of specificity required by Section 14 of the Act and the Commission's regulation."

Petitioner's attempt to obtain reconsideration of this final decision (R. 196) was denied by the Commission on July 29, 1954 (R. 270-272), and on August 12, 1954, he again brought suit in the district court (R. 1), seeking a declaratory judgment that his dismissal was in violation of the Veterans' Preference Act and applicable regulations, and an order directing his reinstatement.

In the ten counts of his complaint (R. 1-6), petitioner alleged numerous defects in the proceedings which resulted in his discharge, including, *inter alia*, that the statement of charges against him was not sufficiently specific to meet statutory requirements (R. 2-3). On cross-motions for summary judgment (R. 7-8), the district court, McLaughlin, J., denied the Government's motion and awarded summary judgment to petitioner (R. 9-14) on the ground that none of the charges against him met the requirements of Section 14 of the Veterans' Preference Act that reasons for discharge must be stated "specifically and in detail." 5 U.S.C. 863.

On appeal, the Court of Appeals reversed on January 12, 1956, holding that "Charges 1(a), 1(b), 2 and 3,

on which the Commission relied, appear to us to give the appellee sufficient information of the charges against him to afford him a 'fair chance to defend himself.'" (Pet. 2a). The court remanded the case to the district court for consideration there of the other matters raised in petitioner's complaint, and, after additional proceedings, that court granted summary judgment to the respondents. Petitioner appealed to the Court of Appeals, which in an extensive opinion (Pet. 4a-9a) examined *seriatim* each of petitioner's allegations, and rejected all of them, concluding that all procedural requirements were met in effecting petitioner's dismissal.

ARGUMENT

The extensive proceedings below have established that petitioner's removal from the federal service was accomplished in full compliance with applicable statutes and regulations. The action of the agency in discharging petitioner has been reviewed on the merits by the Civil Service Commission, and all of the legal issues involved have been resolved against him in the course of three hearings by the Court of Appeals. The decisions of the appellate court rest upon well-settled rules, and, contrary to petitioner's contentions, in no way conflict with holdings of the Court of Claims. Petitioner raises no issues warranting review of his dismissal by this Court.

1. Petitioner's primary contention (Points I, II, III, VI and VII, Pet. 24-27, 32-33) is that although the letter dismissing him was signed by defendant Baughman, the President of Federal National Mortgage Association, the actual decision to remove petitioner was made by Foley, the Chairman of FNMA's Board of Directors.

Petitioner argues (Point I, Pet. 24) that, misled by this fact, he erroneously sued Baughman instead of Foley, and that, because he named the wrong defendant, the decisions below are invalid. The Government has at no time defended the suit on the basis that the wrong defendant was named, and petitioner obviously cannot object to the holding below on that ground.

Moreover, Foley, as Chairman of FNMA's Board, clearly was an appropriate official to dismiss petitioner, since under the corporation's by-laws he was the "administrative officer" with respect to employment. (Pet. 6a). Accordingly, the letter of dismissal signed by Baughman, the President, expressly states that after "careful consideration by me *and by the Chairman of the Board,* I am *authorized* to notify you * * * that the charges are sustained * * *." [Emphasis added.] (R. 142). The fact that both Baughman and Foley approved petitioner's dismissal does not detract from its validity, but rather emphasizes that his case received careful review.

2. Petitioner alleges deficiencies in both the Statement of Charges against him and the Letter of Dismissal (Points IV, V, Pet. 27-32); these contentions, however, were carefully considered and properly rejected by the Court of Appeals. In its January, 1956, opinion (Pet. 1a) the court found that the Statement of Charges gave petitioner sufficient notice of the charges against him to afford him a fair chance to defend himself. Pointing out that the charges were lengthy and detailed; though he complained of the "are adequately identified as to time, place and persons," the court noted that petitioner's reply "was also lengthy and detailed; though he complained of the vagueness of the charges, he clearly understood them

and at great length endeavored to rebut them" (Pet. 2a-3a). This decision merely applied the statutory standard, as interpreted by both the Court of Appeals and the Court of Claims, to the circumstances of this case. See, *e.g.*, *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.), certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U.S. 819; *Deak* v. *Pace*, 183 F. 2d 997 (C.A.D.C.); *Blackmar* v. *United States*, 128 C. Cls. 693.

Likewise, the Court of Appeals in its latest opinion was clearly correct in holding that the letter of dismissal, advising petitioner that "the charges are sustained," sufficiently informed him of the reasons for his removal. The court stated (Pet. 5a-6a):

> The statute [Section 14 of the Veterans' Preference Act, 5 U.S.C. 863] provides that no preference eligible shall be discharged except for reasons given in writing. The charges were stated in writing and with sufficient specificity. They were sustained, and Green was so notified in writing. We think direct reference to the charges as sustained was a sufficient statement of the reasons for the discharge.

See also *Blackmon* v. *Lee*, 205 F. 2d 13, 14 (C.A.D.C.).[2]

[2] The letter of dismissal in this case did more than meet the test established in *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A.D.C.), where the employee had been advised only that "Careful consideration has been given to your reply, together with the facts developed during the investigation, and the conclusion has been reached that the evidence is such as to show your unsuitability for continuance in the Internal Revenue Service." 211 F. 2d at 30. The court condemned this notice as failing "to disclose which of the charges contained in the notice of proposed adverse action were relied upon for removal; or, indeed, whether removal rested upon any of the charges." In the instant case, the letter of dismissal refers specifically to the statement of charges served on petitioner, and advises

3. Finally, there is no basis for petitioner's claim (Point VIII, Pet. 33) that the Court of Appeals refused to consider his contentions that the action by the administrative agency was arbitrary and capricious, thereby conflicting with decisions of the Court of Claims. The opinion expressly states (Pet. 7a): "We have examined the record with some care and find no ground for that assertion." Similarly, the court held with reference to the claims that Baughman was biased, prejudiced, interested and motivated by bad faith (Pet. 7a): "We find no basis in the record for these assertions." And, after reaffirming its findings that all procedural requirements were met in effecting petitioner's dismissal, the decision concludes with these words (Pet. 8a-9a):

> * * * Green insists his discharge was arbitrary and capricious. The charges against him, and the

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him that "the charges are sustained * * *." This language establishes the specific reasons for petitioner's removal, identifying as it does the charges against him and explicitly informing him that they have been upheld.

Nor is this decision in conflict with the Court of Claims' holding in *Blackmar* v. *United States*, 128 C. Cls. 693. That case involved the validity, not of a letter of dismissal, but of findings of the Civil Service Commission in the course of an administrative appeal. The Court of Claims held that the Commission, in reversing the determination of its regional examiner that major portions of the charges against the employee were insufficiently specific, erred in holding merely that "the charges against Mr. Blackmar are sustained." The court concluded from the record that as a result of this blanket determination, Blackmar's discharge "was based, in part, on charges which did not meet the statutory requirement of specificity." 128 C. Cls. at 706-707. The court recognized, however, that it was only because of the peculiar facts there involved, *i.e.*, a reversal of the hearing examiner's decision, that a simple conclusion sustaining the charges was insufficient; the opinion expressly states "* * * that where the decision of the regional office is merely affirmed on appeal additional findings are unnecessary." *Ibid.*

evidence, fall into two main parts: (1) that he was unbearably discourteous to and inconsiderate of subordinates and co-workers, yelling and using toward stenographers such expressions as "You come over here and you come fast" and "God damn it to hell, why can't you do things right" and toward co-workers such terms as "ignoramus" and "imbecile"; and (2) that he used Government office, property and personnel in notable quantities for personal business and affairs, causing delay and postponement of official work.[2] When such charges are sustained, surely no more potent reasons for discharge for the good of the Government service can be assigned. It is essential to the good of such service that employees devote Government time to Government service and that superiors at all levels operate with a decent regard to at least the rudiments of accepted manners toward subordinates.[3]

[2] Petitioner's unsupported allegations of arbitrary action and bias are equally without merit under the decisions of the Court of Claims upon which he relies. The Court of Claims has made clear that charges of bad faith must be more than mere conjecture, and particularly that a contention of an employee that his superiors desired to be rid of him, even if true, is no basis for reversal of his dismissal. *Elchbegoff v. United States*, 123 C. Cls. 709, 712-713; cf. *Knotts v. United States*, 128 C. Cls. 489.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JULY, 1957.

APPENDIX A

Statute and Regulations Involved

Section 14 of the Veterans Preference Act of 1944, as amended (5 U.S.C. 863) provides in pertinent part as follows:

> § 863. Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.
>
> No permanent or indefinite preference eligible * * * shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *

Applicable Civil Service Regulations, set out in 5 C. F. R. § 22, provide in pertinent part:

> § 22.2 *Notification of proposed actions; charges and opportunity for answer—(a) Advance written notice of thirty days.*—No employee covered by the regulations in this part shall be discharged, suspended for more than 30 days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the employee whose discharge, suspension for more than 30 days, furlough without pay, or reduction in rank or compensation is sought, shall have at least 30 days' advance written notice stating any and all reasons, specifically and in detail, for any such proposed action. * * *
>
> * * * * * *
>
> § 22.3 [as amended, 18 F.R. 8227] *Notification of adverse decisions of administrative officers of agencies.*—Adverse decisions by administrative officers following notification of proposed adverse action, charges and opportunity for answer shall be in writing, dated, and submitted to the employee promptly after such decisions have been made. The employee shall also be advised, in the same notification, of his right to appeal, to the appropriate office of the Civil Service Commission, as provided in § 22.4.

APPENDIX B

FEDERAL NATIONAL MORTGAGE ASSOCIATION

HOUSING AND HOME FINANCE AGENCY
811 VERMONT AVENUE NW., WASHINGTON 25, D. C.

July 14, 1952.

MR. A. LINCOLN GREEN,
Federal National Mortgage Association,
Room 857, Lafayette Building,
811 Vermont Avenue, NW., Washington, D. C.

Subject: Statement of Charges

DEAR MR. GREEN: Charges of improper conduct, as described below specifically and in detail, in the course of your employment by Federal National Mortgage Association, a corporation wholly owned by the Federal Government, are hereby preferred against you. In accordance with established policy and Civil Service Regulations you will be given an opportunity to answer these charges personally and in writing and to furnish affidavits in support of your answer. Your answer and affidavits, if any, will be given full consideration in determining whether the proposed action indicated below shall be taken.

Charge I. Improper Conduct Toward Office Personnel

(a) That during the period between November 1950 and February 1951, you were at times rude and discourteous and used severe language to the stenographer who was assigned to assist you; and on one occasion you flew into a rage because she failed to bring her notebook when you called her, although her desk was only ten feet from yours, and used abusive language to the extent that she was made to cry and, as a

result thereof, she complained to the General Counsel and threatened to resign unless given another assignment. Subsequently she was given another assignment. At that time you were told of the complaint made by the stenographer, and you were warned by the General Counsel that such conduct toward office personnel would not be tolerated and must not be repeated. You stated there would be no repetition of such conduct.

(b) That during the period between February 1951, and June 1952, your attitude toward the second stenographer assigned to assist you was on numerous occasions distasteful and unpleasant, insulting, rude, harsh, and abrupt, notwithstanding your having previously been warned as to such conduct. You frequently lost your temper, and on two occasions became so enraged that you threw a small telephone book toward her and hit her desk. You threw papers to the floor at one time when the lawyer sharing your office asked the stenographer to do some work for him. On various occasions you knocked on your desk without calling your stenographer and said "Take this!" or "Do this!" On other occasions you said to her "You come over here and you come fast!" Once you yelled at her and said if she didn't like the way things were done in your office she knew what she could do. On another occasion you swore at her when she passed on to you a telephone number that had been given to her erroneously by saying "God damn it to hell, why can't you do things right?"

That as a result of your conduct the stenographer became so upset and disturbed she was made to cry on various occasions; and finally in June 1952 this second stenographer also threatened to resign her Government position unless given another assignment, which was done in order to retain her services.

That you have been critical and arrogant toward

your co-workers in that when they have in good faith disagreed with you on some point of law, you have called them "ignoramus" or "imbecile".

Charge VI. Improper Use of Government Office and Property

(a) That during the period between November 1950 and February 1951, you were assigned Government office space, including miscellaneous office supplies and equipment, and the services of a Government stenographer to carry on and perform your official duties for the Association.

During that period you improperly used the office and its miscellaneous supplies and equipment by requiring the stenographer to type your personal letters, or letters other than official letters, on Government typewriters, and to use Government stationery and other supplies and equipment.

(b) That during the period between February 1951 and June 1952, you were assigned Government office space, including miscellaneous office supplies and equipment, and the services of a Government stenographer to carry on and perform your official duties for the Association. That beginning in the summer or fall of 1951 and extending for a period of over six months and ending in the spring of 1952, a house was being constructed for your personal account.

During the foregoing periods and particularly while the house was in process of construction and immediately prior thereto, you improperly used the office and its miscellaneous equipment, including telephones, typewriters, file folders, stationery, filing cabinets, and other supplies and equipment by making and receiving numerous telephone calls concerning your personal business; and by requiring your stenographer to type personal letters for you, to keep personal books and

records for you, and to make personal telephone calls for you.

Charge III: Improper Use of Government Personnel

(a) That during the period between November 1950 and February 1951, you improperly used the services of the Government stenographer who was assigned to assist you by requiring her to write personal letters for you and to sort various personal invoices, bills, and other papers, all during official Government working hours.

(b) That during the period between February 1951 and June 1952, and particularly while the house was under construction and immediately prior thereto, and during official hours of business, you improperly used the services of the Government stenographer who was assigned to assist you, in the following respects:

1. You required her to make numerous telephone calls concerning your personal business to supply houses and stores selling building materials and supplies; and to your architect and to contractors.

2. You required her to write letters and address envelopes to contractors and supply houses concerning bids, estimates, prices, and other matters, all relating to your personal business.

3. You required her to set up and maintain personal correspondence files for you, and files for bids and estimates.

4. You required her to prepare personal checks and maintain personal check book and records for you.

5. You required her on numerous occasions to leave the Government office and building where she was employed to take care of personal business for you, including errands to put coins in the parking meters where your personal car was parked on the street.

That the improper use of the stenographer, as set out above, particularly during the time the house was under construction, required her to devote practically three-fourths of her time to your personal work, leaving only approximately one-fourth of her time available for her Government duties; that during such period you frequently interrupted this stenographer while she was performing official work for another lawyer who shared your office space, and required her to attend to your personal business and to delay completion of such official work, and such official work was frequently delayed and postponed as a consequence thereof.

Charge IV. Improper Absences From Office

That during the period of six or more months while your house was under construction, you frequently absented yourself from your office during official working hours at least two or more hours at various times daily, without permission and without leaving word of where you were going. You failed to submit the required leave slips for such absences, nor did you account for or explain the reasons for such absences.

Charge V. Refusal to Respect Authority of Superiors

That during the period between April 1951 and April 1952, you were frequently resentful of the authority of your immediate superiors to the point of insubordination. Almost consistently you adopted an argumentative attitude when your superiors expressed any disagreement with the conclusion you reached on any matters and plainly showed and expressed resentment to any suggestion for change or further research. On one occasion, involving preparation of a legal instrument, you were unwilling to make a change suggested by your superior, an Assistant General Counsel, and he was

forced to order you to make such change. On another occasion you had been requested by an Assistant General Counsel to write a letter which subsequently did not meet with the approval of the Assistant General Counsel. When he suggested a change, you informed him that if he did not like the way you had prepared the letter he could change it himself or get someone else to do so.

* * * * *

You are advised that this letter constitutes notice of proposed adverse action, in accordance with Section 14 of the Veterans' Preference Act of 1944; and that the proposed adverse action is discharge, and that the proposed effective date thereof is August 15, 1952, at the close of business on that day.

During the notice period mentioned above, you are being retained in an active duty status.

You will be given a period of time terminating at the close of business on July 31, 1952, to answer the foregoing charges personally and in writing and to furnish affidavits in support of your answer. Such answer and affidavits, if any, should be submitted in triplicate to J. S. Baughman, President, Federal National Mortgage Association, 811 Vermont Avenue N.W., Washington 25, D. C. Failure by you to answer within the time allowed will result in the charges being considered sustained.

Very truly yours,

(S.) J. S. BAUGHMAN,
President.